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16 IN THE UNITED STATES DISTRICT COURT
17 FOR THE CENTRAL DISTRICT OF CALIFORNIA
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HORACE EDWARDS KELLY,
Petitioner,
v.
R.K. WONG, Acting Warden,,
Respondent.

DEATH PENALTY CASE

93CV2951-TJH

Related Cases: 92CV5420-TJH,
98CV2722-TJH, 98CV2723 TJH

**OPPOSITION TO PETITIONER'S
MOTION TO STAY FEDERAL
HABEAS CORPUS
PROCEEDINGS DUE TO
INCOMPETENCE OF
PETITIONER**

Judge The Honorable Terry J.
Hatter Jr.
Hearing Date: October 21, 2009:

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PRELIMINARY STATEMENT

Condemned inmate Horace Kelly contends that he is entitled to an indefinite stay of the two federal habeas proceedings before this Court because he is allegedly unable to communicate rationally with his counsel due to suffering from schizophrenia. Kelly has not met his burden of proof of showing that he lacks the ability to understand his position and to rationally communicate with his current counsel. A thorough review of the extensive mental health information pertaining to Kelly shows that malingering is a factor in Kelly's presentation, and that his presentation of symptoms is not consistent with schizophrenia. The inconsistencies in Kelly's mental health history, combined with the evidence of malingering, show that Kelly is willfully misrepresenting the extent of his mental illness because he is sufficiently rational to understand that his behavior is his best defense against being executed. So even though Kelly is clearly mentally ill, and his ability to communicate is affected by his mental illness, Kelly has nevertheless failed to show by a preponderance of the evidence that he lacks the present ability to communicate rationally with current counsel. Kelly cannot refute the evidence showing that he has sufficient control over his symptoms such that he could provide information requested by current counsel in response to concrete questions -- if he were motivated to do so. Kelly has the present ability to provide information about his past, the crimes, or his criminal trial by answering specific questions about whether a specific thing happened, or whether he was told particular information. However, Kelly's anxiety, combined with his lack of incentive to cooperate, sufficiently impairs his communication such that a question from his current counsel that requires a narrative answer from Kelly would be a frustrating and likely futile endeavor. The right to competency that is intended to give meaning to Kelly's statutory right to counsel in the proceedings before this Court, however, does not require that Kelly possess the ability to provide information at the higher level of

1 functioning represented by unstructured questioning by his counsel. Accordingly,
2 for the reasons detailed below, Kelly's motion for an indefinite stay of his collateral
3 challenges to his two state court judgments of conviction and sentences of death
4 based on his alleged lack of mental competency should be denied.

5 **PROCEDURAL BACKGROUND**

6 On November 16, 1984, Kelly attempted to rape Sonia Reed before shooting
7 her to death. The next day, Kelly attempted to rape Ursula Houser before shooting
8 her to death. Both murders occurred in San Bernardino County. Later that same
9 month, on Thanksgiving Day, in Riverside County, 13-year-old Shannon P. and her
10 11-year-old cousin, Danny O. walked to the store after Thanksgiving dinner to buy
11 candy. As they walked home, Kelly, wearing a security guard uniform, grabbed
12 Shannon P. around her neck from behind and began dragging her toward his van.
13 When her 11-year-old cousin came to her aid, Kelly shot him. After wounding
14 Danny, Kelly fired another shot at close range striking Danny between the eyes as
15 the boy was pleading with Kelly to spare his life. Police stopped Kelly a few hours
16 later as he drove the van. Kelly was wearing a security guard uniform and was in
17 possession of a .357 magnum revolver he had purchased two months earlier.
18 Kelly's gun had blood on its barrel that matched Danny's blood type and the bullets
19 recovered from the crime scene were conclusively proven to have been fired from
20 Kelly's gun. Following his arrest in Riverside County, Kelly confessed to police on
21 tape to the murders of the two women in San Bernardino County. See, *People v.*
22 *Kelly*, 51 Cal.3d 931, 940-942 [800 P.2d 516, 275 Cal.Rptr. 160] (1990) (*Kelly I*);
23 *People v. Kelly*, 1 Cal.4th 495, 512, 514-515 [822 P.2d 385, 3 Cal.Rptr.2d 677]
24 (1992) (*Kelly II*).

25 In 1986, a Riverside County jury found Kelly guilty of murdering Danny O.
26 (Cal. Penal Code § 187), and further found true two kidnap-murder special
27 circumstance allegations (Cal. Penal Code § 190.2(a)(17)(ii)) and a personal gun-
28 use allegation (Cal. Penal Code § 12022.5). After the penalty phase, the jury

1 determined the appropriate punishment was death and the trial court entered a
2 judgment of death. *Kelly I*, 51 Cal.3d at 931.

3 Kelly's trial for capital murder in San Bernardino followed. The criminal
4 proceedings were delayed during trial to litigate Kelly's competency to stand trial.
5 Various court-appointed experts examined Kelly and those experts unanimously
6 concluded that Kelly was mentally competent to stand trial, and the trial court
7 found Kelly competent to stand trial. The jury subsequently found Kelly guilty of
8 murdering Houser and Reed, and of rape, attempted rape, and robbery. Cal. Penal
9 Code §§ 187, 664, 261(2). The jury also found Kelly personally used a firearm in
10 the commission of those offenses and found true two rape-murder and one multiple-
11 murder special circumstance allegations. Cal. Penal Code §§ 12022.5, 12022.3 (a),
12 190.2 (a)(3) & (17)(iii). The jury rejected Kelly's plea of not guilty by reason of
13 insanity, and instead found him to be sane, and returned a death verdict. *Kelly II*, 1
14 Cal.4th at 495.

15 The California Supreme Court affirmed Kelly's Riverside County conviction
16 and death sentence in 1990. *Kelly I*, 51 Cal.3d at 931. Two years later, in the San
17 Bernardino case, the California Supreme Court reduced the rape conviction to
18 attempted rape, reversed the robbery conviction, attendant gun-use enhancement,
19 and robbery-murder special circumstance, and otherwise affirmed the death
20 sentence and judgment of conviction in all other respects . *Kelly II*, 1 Cal.4th at
21 495.

22 In 1992, Kelly requested this Court appoint him counsel and a stay of
23 execution of his Riverside County death sentence. In 1993, Kelly again requested
24 the assistance of this Court with respect to his San Bernardino County death
25 sentence. Pursuant to Kelly's requests, this Court appointed counsel to challenge
26 each of Kelly's judgments of convictions and sentences of death, and issued a stay
27 of execution as to both death sentences.

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1 On January 6, 1995, this Court ordered an evaluation of Kelly by David
 2 Kessler, M.D., to determine whether Kelly lacked the capacity to assist his counsel
 3 with pursuing his federal habeas claims. Dr. Kessler examined Kelly and reviewed
 4 his history and opined to this Court in a report dated March 21, 1995 that, if it were
 5 assumed that Kelly's current presentation was an accurate indicator of his current
 6 psychiatric condition, then Kelly was suffering from a psychotic mental disorder so
 7 severe that it "precludes his capacity to appreciate his current legal position and
 8 make rational choices with respect to the current court proceedings." On April 29,
 9 1996, this Court appointed Phyllis Kelly as next friend to Kelly.

10 No habeas petitions were filed with this Court prior to the enactment of the
 11 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The State pre-
 12 emptively obtained a writ of mandate from a three-judge panel of the Ninth Circuit
 13 finding that any petitions filed by Kelly would be time barred with the exception of
 14 any claims raising his incompetency to be executed. *Calderon v. United States*
 15 *District Court (Kelly)*, 127 F.3d 782 (9th Cir. 1997) (*Kelly III*).

16 In 1998, a trial was held in Marin County to determine whether Kelly was
 17 legally sane for the purpose of execution.¹ Dr. Sophia Vinogradov, a defense
 18 expert retained for the present motion, Dr. Roderick Pettis, an expert appointed by
 19 the court, and Drs. Maurice Lyons and Roderick Ponath, members of the staff at
 20 San Quentin, all testified that Kelly was not legally sane to be executed. In spite of
 21 these expert opinions, a jury concluded that Kelly was competent to be executed.

22 Kelly subsequently filed separate habeas petitions in this Court challenging the
 23 Riverside County and San Bernardino County judgments of conviction and
 24 sentences of death. Each petition raised a competency to be executed claim among
 25 other claims. This Court subsequently granted Kelly equitable tolling. The three-

26 ¹ The jury was instructed that Kelly had the burden of proof by a
 27 preponderance of the evidence to show that by reason of a mental disease and/or
 28 mental defect Kelly was unaware of the fact of the impending execution or was
 unaware of the reason he was being executed.

1 judge panel of the Ninth Circuit granted the State's petition for writ of mandate in
2 part, ordering that all but Kelly's claim of mental incompetency to be executed
3 must be dismissed. *Calderon v. United States District Court*, case number 98-
4 70569 (9th Cir. 1998) (*Kelly IV*). The Ninth Circuit granted en banc review, and
5 reversed the decision of the three-judge panel, thereby affirming this Court's grant
6 of equitable tolling. *Calderon v. United States District Court*, 163 F.3d 530 (9th
7 Cir. 1998) (*Kelly V*).

8 On April 1, 1999, Kelly filed amended habeas petitions in this Court in case
9 numbers 92-5420 TJH and 93-2951 TJH. In April of 2003, Kelly filed habeas
10 petitions in the California Supreme Court challenging both the Riverside County
11 and San Bernardino County death sentences, relying on the United States Supreme
12 Court's decision in *Atkins v. Virginia* (2002) 536 U.S. 304, 321, 122 S.Ct. 2242,
13 153 L.Ed.2d 335, in claiming that it would violate the Eight Amendment's
14 proscription on cruel and unusual punishment to execute him because he is
15 allegedly mentally retarded.² (California Supreme Court case Nos. S115428 and
16 S115483.) The California Supreme Court issued an order to show cause in both
17 cases, returnable to the Riverside County Superior Court. An evidentiary hearing
18 was conducted from January 23, 2006, through February 1, 2006, on Kelly's mental
19 retardation claim. Dr. Alan Abrams' testified as an expert witness for the state,
20 opining that Kelly was not mentally retarded. Dr. Vinogradov was one of the
21 expert witnesses called by Kelly who testified that Kelly was mentally retarded.
22 Following the evidentiary hearing, a Riverside County Superior Court judge found
23 that Kelly had not satisfied his burden of establishing by a preponderance of
24 evidence that he was mentally retarded. On June 2, 2006, Kelly filed a habeas
25 petition in the California Supreme Court, challenging the superior court judge's

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² Before filing in the California Supreme Court, Kelly filed a motion in this
27 Court for an evidentiary hearing on the issue of his mental retardation. After
28 Respondent opposed the motion on the ground the *Atkins* claims were unexhausted,
Kelly withdrew his motions, agreeing that the claims were unexhausted.

Atkins finding. On October 18, 2006, the California Supreme Court denied the petition on the merits.

On April 10, 2009, Kelly filed a motion to stay federal habeas proceedings due to his alleged lack of mental competency to assist his current counsel in pursuing federal habeas relief from his Riverside County and San Bernardino County judgments of conviction and sentences of death. This Court ordered a response to Kelly's motion filed on or before September 25, 2009.

ARGUMENT

I. KELLY IS NOT ENTITLED TO A STAY OF FEDERAL HABEAS PROCEEDINGS

Kelly contends that he lacks the present ability to consult with his federal habeas counsel with a reasonable degree of rational understanding and does not have a rational, as well as a factual understanding of his habeas proceedings pending before this Court; and as a result, he cannot assist his current counsel with respect to claims in his two pending habeas petitions challenging his final judgments of conviction and sentences of death in Riverside and San Bernardino Counties. (Mtn. at 18, P.'s & A's at 18.) Kelly seeks an indefinite stay of his federal habeas proceedings due to his alleged mental incompetency to assist his current counsel in collaterally challenging his convictions and two death sentences. Kelly's motion should be denied because he has failed to sustain his burden of demonstrating that he lacks the ability to rationally communicate with his current counsel such that they will be unable to meaningfully pursue federal habeas relief.

The United States Court of Appeals for the Ninth Circuit has concluded that the right to counsel afforded by Congress to inmates challenging state court death judgments (18 U.S.C. § 3599(a) (2), and former 21 U.S.C. § 848(q)(4)(B)) creates an implied statutory right to competence during federal habeas proceedings. *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 813 (9th Cir. 2003); see also, *Nash v. Ryan*, 2009 U.S.App.LEXIS 20284 (9th Cir. 2009). “[F]ederal habeas relief in a

1 death penalty case requires that the petitioner possess essentially the same mental
2 capacity that renders him competent to stand trial: the ability to understand and to
3 communicate rationally with counsel when necessary.” *Nash*, 2009
4 U.S.App.LEXIS 20284, at **22-23.

5 **A. KELLY BEARS THE BURDEN OF PROOF REGARDING**
6 **MENTAL INCOMPETENCY TO ASSIST FEDERAL**
7 **HABEAS COUNSEL**

8 It is clear that the burden of proof as to mental competency to assist current
9 counsel appropriately rests with Kelly. Both California and federal law governing
10 mental incompetency of a criminal defendant to stand trial places the burden on the
11 proponent of a claim of mental incompetency, and it would be incongruous to do
12 otherwise in the context of the right to mental competency in the context of federal
13 habeas proceedings. Further, since due process is not offended by placing the
14 burden of proof of a claim of incompetency on a criminal defendant, it is axiomatic
15 that there is no impediment to placement of the burden on a habeas petitioner
16 collaterally challenging a criminal conviction. Moreover, Kelly’s case aptly
17 illustrates precisely why the burden should be on the proponent of a claim of mental
18 incompetency.

19 Important issues were left unresolved in the Ninth Circuit’s decision in *Rohan*,
20 because the incompetency of *Rohan* was assumed on appeal since a prior
21 determination by the district court that *Rohan* was incompetent was never disputed.
22 *Nash*, 2009 U.S.App. LEXIS 20284, at *22; *Rohan*, 334 F.3d at 819, fn. 11.
23 However, the Ninth Circuit expressly relied on the federal statutory scheme for
24 competency to stand trial in discussing the allocation of the burden of proof in
25 determining whether there has been a sufficient showing to undertake a mental
26 competency determination. *Nash*, 2009 U.S.App. 20284, at *23. Accordingly, it is
27 readily apparent that the Ninth Circuit contemplates use of the federal statutory
28 provisions relating to competency to stand trial for guidance in resolving questions
 relating to determining mental competency for purposes of federal habeas

1 proceedings, including the burden of proof for showing a lack of current mental
2 competency. *Id.*

3 Both California and federal law require the proponent of a claim of mental
4 incompetency to stand trial to bear the burden of proving that claim by a
5 preponderance of the evidence. Cal. Pen. Code § 1368; 18 U.S.C. § 2421(d).
6 Inasmuch as Congress did not place the burden on the government to prove a
7 criminal defendant is mentally competent to stand trial (See, 18 U.S.C. § 2421(d), it
8 would be incongruous to imply such a burden on the State with respect to a right to
9 competency to assist federal habeas counsel. This is particularly true when, as here,
10 the right itself is being implied from a statute granting a right to counsel to
11 condemned inmates collaterally challenging a final judgment of conviction by way
12 of federal habeas. In implying legislative intent, i.e., an implied right to
13 competency, it would not be reasonable to infer that Congress intended a greater
14 intrusion upon the State's right to make and enforce its criminal laws than is
15 mandated by the Constitution itself. This is evident from the recognition by
16 Congress of the need to limit the intrusion upon the states from a federal court's
17 exercise of federal habeas jurisdiction. See, 28 U.S.C. § 2254, as amended by
18 AEDPA; see e.g. *Calderon v. Thompson*, 523 U.S. 538, 554-555 [118 S.Ct. 1489,
19 140 L.Ed.2d 728 (1998) ["profound societal costs" makes it necessary to impose
20 "significant limits" on exercise of habeas jurisdiction by federal courts]; *Brecht v.*
21 *Abrahamson*, 507 U.S. 619, 635 [123 L.Ed.2d 353, 113 S.Ct. 1710] (1993)
22 [recognizing "enduring respect" for States' interest in finality of convictions that
23 have survived direct review within the state court system].

24 The United States Supreme Court has made clear that it does not offend due
25 process to require a defendant in a criminal trial to bear the burden of proving by a
26 preponderance of the evidence that he or she is mentally incompetent to stand trial.
27 *Medina v. California*, 505 U.S. 437, 451 [112 S.Ct. 2572, 120 L.Ed.2d 353] (1992),
28 citing e.g. *Patterson v. New York*, 432 U.S. at 208 ('Due process does not require

1 that every conceivable step be taken, at whatever cost, to eliminate the possibility of
 2 convicting an innocent person'); *Snyder v. Massachusetts*, 291 U.S. 97, 105 [78
 3 L.Ed.2d 674, 54 S.Ct. 330 (1934) (a state procedure 'does not run afoul of the
 4 Fourteenth Amendment because another method may seem to our thinking to be
 5 fairer or wiser or to give a surer promise of protection to the prisoner at bar'). A
 6 due process right in the context of postconviction proceedings is "not parallel to a
 7 trial right, but rather must be analyzed in light of the fact that [the convicted
 8 inmate] has already been found guilty at a fair trial, and has only a limited interest
 9 in postconviction relief. *District Attorney's Office for the Third Judicial District v.*
 10 *Osborne*, ____ U.S. ___, 129 S.Ct. 2308, 2320 (2009); see also, *Bonin v. Vasquez*,
 11 999 F.2d 425, 429 (9th Cir. 1993) (Due process in a postconviction proceeding does
 12 not demand effective assistance by appointed counsel). Accordingly, it is clear that
 13 no greater burden should be placed upon the State in the context of Kelly's right to
 14 mental competence in federal habeas proceedings than would be required of a
 15 defendant asserting incompetency to stand trial in either a California or federal
 16 criminal prosecution.

17 Further, a full and fair resolution of the pending proceedings is consistent with
 18 Kelly bearing the burden of proof on the question of his mental competency to
 19 assist current counsel. As Justice O'Connor explained in her concurring opinion in
 20 *Medina*, "placing the burden on the defendant in this limited group of cases was
 21 permissible because it provided the defendant with an incentive to cooperate with
 22 the information-gathering process necessary to a reliable competency
 23 determination." *Cooper v. Oklahoma*, 517 U.S. 348, 355, fn. 6. [116 S.Ct. 1373,
 24 134 L.Ed.2d 498] (1996).

25 Notably, Justice O'Conner further observed in *Medina*:

26 "The main concern of the prosecution, of course, is that the defendant
 27 will feign incompetence in order to avoid trial. If the burden of proving
 28 incompetence rests on the government, a defendant will have less incentive to

1 cooperate in psychiatric investigations, because an inconclusive examination will
2 benefit the defense, not the prosecution.” *Medina*, 505 U.S. at 455.

3 The concern of the State is no different at this juncture, and the State’s
4 entitlement to the limits on this Court’s exercise of federal habeas jurisdiction
5 demand that Kelly bear the burden of proof on the question of his alleged inability
6 to rationally assist counsel to the extent necessary to meaningfully pursue his
7 habeas claims. The report prepared in 1995 by Dr. Kessler, the expert appointed to
8 assist this Court in determining whether to proceed with a next friend status, aptly
9 illustrates the reason the burden of proof should be with Kelly on the issue of his
10 mental competency to communicate rationally with his current counsel. In terms of
11 concerns of the State over the obvious incentive of a condemned inmate to
12 malingering, it is notable that Dr. Kessler’s opinion was couched in terms of assuming
13 that Kelly’s presentation of symptoms was in fact an accurate indicator of his
14 psychiatric condition. Assuming that Kelly was not exaggerating his symptoms,
15 i.e., malingering, then Dr. Kessler opined that Kelly was suffering from a psychotic
16 mental disorder so severe that it “precludes his capacity to appreciate his current
17 legal position and make rational choices with respect to the current court
18 proceedings.” Accordingly, while it is clear Kelly is in fact mentally ill, the degree
19 to which Kelly is feigning and exaggerating symptoms of mental illness is
20 adversely affecting the ability of mental health experts to determine whether he is
21 actually mentally incompetent for purposes of the federal habeas proceedings
22 before this Court – which is precisely why the burden of proof on the question of
23 his current mental competency within the meaning of *Rohan* appropriately rests
24 with Kelly.

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1 **B. KELLY'S MENTAL ILLNESS IS NOT IN AND OF ITSELF A
2 SUFFICIENT BASIS FOR A FINDING OF MENTAL
3 INCOMPETENCE**

4 Kelly contends he is "entitled to an indefinite stay of federal proceedings"
5 because he "suffers from severe mental illness, which renders him incapable of
6 understanding his position and rationally communicating with his counsel." (Mtn.
7 at 1.) There is no dispute that Kelly is severely mentally ill. (See, Abrams' Decl. at
8 ¶¶ 4-5.) However, it is well established that the presence of mental illness is not a
sufficient basis for demonstrating mental incompetency.

9 Kelly notes that virtually every mental health expert that has evaluated him
10 since he has been confined at San Quentin State Prison has determined that he
11 suffers from mental illness. (Mtn. at 1.) What Kelly fails to explain is how his
12 extensive mental health history prior to his confinement on California's death row
13 fails to disclose his suffering from the severe form of schizophrenia that is the basis
14 for his claim of mental incompetency to assist current counsel.

15 Nothing in the records pertaining to Kelly indicate that his mental capacities
16 have changed significantly since he was found competent to stand trial in 1987.
17 (Abrams' Decl. at ¶¶ 6, 70.) Dr. Sheffield's report from 1987 quotes Mr. Kelly as
18 providing the same double-talk speech pattern, which has become the basis of
19 Kelly's claim that he has completely lost all rationality since arriving at San
20 Quentin. (Abrams' Decl. at ¶ 16.) Kelly's current retained mental health experts
21 provide extensive documentation showing that Kelly's behaviors prior to 1987
22 when he was found competent to stand trial, were very similar to his present
23 behaviors. They document the gibberish speech and writing, the hoarding of
24 garbage, Kelly's poor personal hygiene, the inappropriate smiling and laughing, the
25 pseudo disorientation, the refusal to cooperate with counsel and the refusal to
26 acknowledge his crimes. Alan Abrams, M.D., evaluated Kelly's mental
27 competency in the context of his federal habeas proceedings at the request of the
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1 State. Dr. Abrams' notes a pattern, i.e., after Kelly arrived in San Quentin, he
2 displayed these symptoms more frequently as the threat of execution become more
3 pressing, and less as the threat of execution abated. (Abrams' Decl. at ¶¶ 33-35,
4 39.) Yet, Kelly fails to explain how he could have the most severe form of
5 schizophrenia ever observed, as some have opined, without addressing the
6 relationship between onset of the illness and his impending execution in 1992, the
7 lack of prominent hallucinations, the lack of a clear first episode, the lack of
8 delusions that are distinguishable from denial of oppressive reality, and the very
9 late onset in life. (Abrams' Decl. at ¶ 66.)

10 Many mental health professionals had extensive time to observe and examine
11 Kelly in the years before he was placed on death row and none found clear
12 schizophrenia or florid psychosis. (Abrams' Decl. at ¶ 67.) A careful review of
13 the mental health records demonstrates that since 1992, clinicians have assumed
14 that Kelly became "floridly psychotic" due to schizophrenia unrelated to the stress
15 of facing execution. The assumption that Kelly must suffer from schizophrenia
16 because he provides incoherent responses most of the time fails to account for the
17 extreme "dementia" and "disorientation" that Kelly demonstrates that is not
18 typically found in schizophrenia, and ignores the times when he offers rational
19 responses. (Abrams' Decl. . at ¶ 67.) Taking into account all aspects of what
20 mental health professionals have observed with Kelly, his "incoherent responses
21 appear to be more the result of severe anxiety than the product of delusional beliefs
22 or the loss of cognitive faculties." (*Id.*)

23 The more explanatory diagnosis for Kelly's use of approximate answers, his
24 extreme denial of emotionally significant facts in his life, and his
25 noncommunicative speech patterns is Ganser's Syndrome. Kelly regularly provides
26 examiners with absurd or approximate answers to questions, such as giving the
27 wrong date consistently as February when it is not February (unless it is February in
28 which case he states a different month), or saying he is in a school, and not

identifying that he is in San Quentin State Prison. Approximate answers are not seen in schizophrenia or other biologically based mental illnesses. Approximate answers, i.e., giving answers that indicate the question was fully understood, but answering in an absurd manner, are the hallmark of Ganser's Syndrome. (Abrams' Decl. at ¶ 68.)

Dr. Abrams interviewed Kelly in 2004. As Dr. Abrams explains:

"Mr. Kelly's accounts of where he is, his age, his profession or schooling should be viewed as careless and consciously inaccurate, not delusional or the result of amnesia about his real identity. These are part of Mr. Kelly's avoidance of communicating, particularly with mental health clinicians. Again, during my 2004 evaluation of Mr. Kelly, when I asked him what he talks about with his attorneys: "like when you go to court what do you talk with them about?" Mr. Kelly responded "I think we talk about everything but what we're there for." Later when I followed up with Mr. Kelly and asked "Do you talk with your attorneys about the crimes you were convicted of, the shootings?" Mr. Kelly responded: "No." I asked "Why not?" Mr. Kelly explained: "They already know what happened." Mr. Kelly's comments show he has a clear awareness of his unwillingness and perhaps his difficulties communicating in a meaningful manner with his counsel. They also reflect a degree of insight is at odds with Mr. Kelly's claim that he lacks basic awareness of the world. I have no doubt that Mr. Kelly fully understands his legal position as a condemned inmate fighting for his life. Mr. Kelly's rambling and non-responsive narrative answers reflect a mixture of conscious control away from communication, and also the biological effects of severe anxiety about, among other things, the murders and his execution."

(Abrams' Decl. at ¶ 74.)

Dr. Abrams' observed much of the same exaggeration and voluntary evasion by Kelly that many observers have commented on since his arrest for his capital crimes. However, he also noticed the contradictions in the records that Kelly is "very sensitive to his environment and the circumstances of observation, examination, and testing." (Abrams' Decl. at ¶ 69.) For example, a number of observers reference Kelly's normal conversations, including use of joking and

1 sarcasm, while others describe him as purposefully evasive and vague, and yet
2 others as incoherent and unresponsive. Dr. Abrams' identifies a pattern to Kelly's
3 "incoherent" speech, and observes that Kelly's associations appear to be
4 structurally patterned rather than loose. (*Id.*)

5 Dr. Abrams aptly notes that the voluntary aspects of Kelly's presentation are
6 evident from the contrast between his minimally symptomatic presentation to Dr.
7 Lyons, and his "pseudo-demented" presentation to Dr. Kessler only a few days later
8 in March 1995. As Dr. Abrams' concludes, the contrast suggests Kelly has some
9 degree of control over his presentation, including his ability to communicate.
10 (Abrams' Decl. at ¶ 73.) Dr. Abrams' also addresses the highly relevant issue of
11 motivation noting that Kelly's "current behavior and non-responsive speech is now
12 likely an artifact of conditioning and rewards." He acknowledges that there is "no
13 reward for 'good' behavior in the Criminal Justice System, and more reward
14 (typically more contact, more positive contact, delay of punishment, and better
15 treatment) for acting 'sick.'" It is in this context that Kelly "understands that his
16 best defense is his current behavior." While Dr. Abrams' is not able to quantify the
17 degree to which Kelly is willfully misrepresenting his clinical picture, he notes that
18 Kelly is willfully misrepresenting the extent of his mental illness. (Abrams' Decl.
19 at ¶ 69.)

20 Relying on *Hill v. Ayers*, 2008 WL 683422, 2008 UD Dist Lexis 30799 (ND
21 Cal. 2008), Kelly argues that the opinions of San Quentin mental health
22 professionals, specifically Roy Johnson, Ph.D., Erika Bencich, Ph.D., and David
23 Parecki, Ph.D. reporting that Kelly suffered from delusions have particular
24 significance. *Id.* at 4-3. While the three staff psychologists are employed by the
25 State, as opposed to Kelly's current or past mental health experts, that does not
26 require that their observations or diagnostic impressions be taken at face value in
27 determining whether Kelly is presently mentally incompetent within the meaning of
28 *Rohan*. The observations of mental health professionals employed by San Quentin

1 cannot serve as a substitute for Kelly failing to reconcile inconsistencies or account
2 for evidence of malingering in claiming to be presently mentally incompetent.
3 Moreover, nothing in the observations and opinions of Drs. Johnson, Bencich, and
4 Parecki compels acceptance of the opinions of the most recent expert opinions
5 obtained by Kelly's current counsel.

6 The first of the three San Quentin staff psychologists relied on by Kelly is Roy
7 Johnson, Ph. D. Dr. Johnson was Kelly's Case Manager at San Quentin in
8 December of 2006. (Petitioner's Exhibit B at p. 191.) Dr. Johnson had previously
9 been Kelly's Case Manager at San Quentin in 2001 or 2002. (*Ibid.*) In the period
10 starting in December 2006, Dr. Johnson saw Kelly on a weekly basis, usually from
11 the front of Kelly's cell. (*Id.*, at p. 192.) Dr. Johnson diagnosed Kelly as having
12 schizophrenia and opined he was severely impaired in the area of communication.
13 (*Id.*, at 194, 201-204.) Johnson observed behaviors in Kelly that were delusional
14 and observed disorganized speech 99% of the time he was observing Kelly. (*Id.*, at
15 201-204, 208.) Dr. Johnson believed there was "a substantial likelihood Kelly
16 would benefit from psychotropic medication." (*Id.*, at 303-304.) Dr. Johnson never
17 saw any evidence that Kelly was malingering and was "95% sure" he was not
18 feigning. (*Id.*, at 305-307.) Dr. Johnson opined Kelly could not communicate
19 rationally with current counsel about any subject relevant to his legal proceedings.
20 (*Id.*, at 309-311.) Dr. Johnson opined that withholding psychotropic medication
21 from a patient with the symptoms displayed by Kelly is a breach of standard of
22 practice for a mental health professional. Dr. Johnson would expect that Kelly's
23 ability to communicate would be improved through the use of medication. (*Id.*, at
24 329-334.)

25 Kelly also relies on the observations of San Quentin staff psychologist Erika
26 Bencich. Dr. Bencich began treating Kelly in February 2007. (Petitioner's Exhibit
27 A at 12.) She saw Kelly approximately 52 to 65 times during the year she treated
28 him. All but one of those contacts were from the front of Kelly's cell. She

1 diagnosed Kelly with schizophrenia, disorganized type. (Id., at 13-14.) About 95%
2 of the time she observed Kelly, he engaged in disorganized speech and was often
3 incoherent. (Id., at 16.) Kelly's General Functioning Score was at 40, meaning he
4 was at the very bottom of the level of functioning which allowed him to be treated
5 in the institution rather than being hospitalized. (Id., at 37-38.) Dr. Bencich found
6 consistently that Kelly is chronically, severely impaired. (Id., at 99.) Dr. Bencich,
7 along with other San Quentin staff, believe that antipsychotropic medication would
8 be an appropriate treatment for Kelly's mental illness but a court order is currently
9 preventing the use of any medication. (Id., at 100-101.) Dr. Bencich does not
10 believe Kelly is malingering because his behavior and symptoms have remained
11 consistent. (Id., at 102-103.) Dr. Bencich did not believe Kelly was able to
12 rationally or accurately communicate his perceptions, memories or desires. Dr.
13 Bencich did not believe Kelly could respond to open-ended or complex questions.
14 (*Id.*, at 103-107.)

15 The third San Quentin staff psychologist that Kelly relies on is Dr. David
16 Parecki. Dr. Parecki was Kelly's Case Manager beginning in July 2005. Kelly was
17 also assigned to Dr. Parecki's group therapy. (Petitioner's Exhibit C at p. 426.) Dr.
18 Parecki diagnosed Kelly as suffering from schizophrenia, undifferentiated type.
19 (*Id.*, at 429.) Sometimes when he attempted to communicate with Kelly, he would
20 not respond. Other times Kelly's response would be off topic. (*Id.*, at 439.) A
21 great majority of the time Kelly's speech would be impaired and incoherent. (*Id.*, at
22 440.)

23 At a meeting of Kelly's treatment team on March 14, 2006, Dr. Parecki noted
24 Kelly's behavior was confused and ritualistic, his speech was illogical, his
25 intellectual functions were below average, he had loose association of thought and
26 had poor reality of contact. Kelly was given a GAF score of 31, close to requiring
27 hospitalization. (*Id.*, at 493-497.) Dr. Parecki indicated he could effectively
28 communicate with Kelly, in that he could speak to Kelly and Kelly would respond

1 back to him. Dr. Parecki noted a recent contact with Kelly, wherein Kelly
2 recognized him and called him by name. Kelly could give him responses to simple,
3 brief questions but could not express any abstract or complex ideas. (*Id.*, at 554-
4 555.) Dr. Parecki characterized Kelly's mental impairment as chronic and severe.
5 (*Id.*, at 574-575.)

6 Dr. Parecki believed that Kelly might benefit from taking antipsychotic
7 medication. (*Id.*, at 574-576.) Dr. Parecki never indicated in the notes in Kelly's
8 file that he believed Kelly was malingering or faking any of his symptoms. (*Id.*, at
9 576-577.) Dr. Parecki did not believe that Kelly could accurately communicate his
10 perceptions, memories or desires. (*Id.*, at 577.) Dr. Parecki opined that Kelly
11 might have trouble answering simple, structured, closed questions because some of
12 his answers are bizarre and sometimes he is not able to stay on task for even the
13 most concrete questions. Kelly could not answer complex, abstract or open-ended
14 questions clearly or consistently. Regarding questions related to the crimes for
15 which he was convicted, Dr. Parecki believed that Kelly could not answer such
16 questions accurately or effectively communicate his thoughts or concerns with his
17 current counsel. Kelly could not remember facts related to the crimes and could not
18 rationally communicate with counsel regarding his case. (*Id.*, at 579-581.) Dr.
19 Parecki has spoken to psychiatrists at San Quentin that have expressed their belief
20 that Kelly's condition would be helped by his taking anti-psychotic medication.
21 Such medication is a standard treatment for schizophrenia. (*Id.*, at 591-592.) The
22 vast majority of contacts between Dr. Parecki and Kelly were from the front of
23 Kelly's cell which limited Dr. Parecki's ability to effectively communicate with
24 Kelly. (*Id.*, at 581-584.)

25 In contrast to the treatment context in which the three San Quentin staff
26 psychologists have considered Kelly's mental condition, Dr. Abrams', the
27 psychiatrist who has evaluated Kelly at the request of the State regarding the
28 question of mental competency to assist current counsel, has focused on the

1 complete mental health history of Kelly which spans decades. In addition to the
2 reports and opinions of the three San Quentin staff psychologists, Dr. Abrams’
3 thorough review of Kelly’s extensive mental health history and medical history
4 included all of the medical records regarding Kelly from San Quentin. Dr. Abrams’
5 also reviewed records and statements regarding Kelly’s childhood and school
6 records. In addition, in 2004, Dr. Abrams’ interviewed Kelly at San Quentin. His
7 interview of Kelly lasted in excess of five hours. Dr. Abrams’ interview of Kelly
8 was video-recorded and the video of the interview is being provided in support of
9 Respondent’s Opposition to Petitioner’s Motion to Stay Federal Habeas
10 Proceedings Due to Incompetence of Petitioner. Dr. Abrams’ has also reviewed
11 declarations from persons who observed Kelly prior to his murdering two women
12 and a child. Dr. Abrams’ also has reviewed reports and diagnoses of the myriad of
13 physicians and clinicians who have treated and or evaluated Kelly over the past two
14 decades. His review of materials has included the declarations provided to this
15 Court in support of Kelly’s pending motion, i.e., the declarations of Dr. Sophia
16 Vinogradov and attorney Mark Olive.

17 With benefit of reviewing the extensive mental health history of Kelly that
18 spans decades, Dr. Abrams’ disagrees with most of the physicians and clinicians
19 who have treated Kelly over the past dozen years. Dr. Abrams’ concludes that
20 Kelly suffers from chronic Ganser’s Syndrome or “prison psychosis” rather than
21 schizophrenia. (Dr. Abrams’ declaration ¶¶ 4, 63-64.) Dr. Abrams’ points out that
22 Kelly had never been diagnosed with schizophrenia before 1992, when facing his
23 first execution date, and seemed to recover without treatment after his execution
24 was stayed. (Dr. Abrams’ declaration ¶ 23.) Kelly’s responses during Dr. Abrams’
25 March 4, 2004, interview demonstrate that Kelly was coherent, he was aware that
26 he was being interviewed and his answers were made in response to Dr. Abrams’
27 questions. Kelly showed no signs of delusions or hallucinations. (Dr. Abrams’
28 declaration ¶ 46.) Kelly’s responses to questions posed by Dr. Abrams’ was not

1 “word salad” as referred to by other evaluators, but was “structured use of language
2 to avoid communication.” (Dr. Abrams’ declaration ¶ 47.) Kelly’s ability to
3 respond appropriately to the testing conducted by Dr. Abrams’ indicate a clear
4 understanding of questions posed to him, at least in response to questions which
5 were concrete and required simple responses. (Dr. Abrams’ declaration ¶ 50.)

6 Dr. Abrams’ diagnosis of chronic Ganser’s Syndrome is more consistent with
7 observations during Dr. Abrams’ interview and not inconsistent with more limited
8 observations made in front of Kelly’s cell by staff at San Quentin. Ganser’s
9 Syndrome, a phenomena associated with prisoners, has symptoms consistent with
10 the manner in which Kelly presents: appearing to be alert and to understand the
11 questions; giving “an incorrect and often ridiculous reply” to questions;
12 disorientation to place and time; occurring in persons of low or borderline
13 intelligence. (Dr. Abrams’ declaration ¶¶ 63-64.) In addition, Kelly displays
14 symptomology inconsistent with schizophrenia. (Dr. Abrams’ declaration ¶¶ 65-
15 67.)

16 **C. KELLY’S ABILITY TO COMMUNICATE WITH CURRENT
17 COUNSEL THROUGH STRUCTURED QUESTIONS IS A
18 SUFFICIENT BASIS UPON WHICH TO DENY HIS
PENDING MOTION**

19 In determining the precise level of the ability to communicate that would
20 ensure Kelly’s right to competency in the context of federal habeas proceedings,
21 this Court must balance the rights of the State with Kelly’s, guided by the limits on
22 the exercise of federal habeas jurisdiction and its duty to resolve the pending
23 proceedings promptly consistent with giving full and fair consideration to the issues
24 presented. With these considerations in mind, it is clear that Kelly is not entitled to
25 an indefinite stay of these proceedings as he has failed to meet his burden of
26 demonstrating that he lacks the present ability to understand and to communicate in
27 a rational manner with his current counsel when necessary.

1 Dr. Abrams' directly addresses the issue before the Court as a result of Kelly's
2 motion to indefinitely stay his habeas proceedings, i.e., what is Kelly's present
3 ability to communicate rationally with his counsel. Dr. Abrams' opines, based
4 upon his review of records and his own observations of Kelly, that Kelly is capable
5 of understanding simple sentences, to compose and speak simple communicative
6 sentences, to understand and remember simple instructions and to engage in limited
7 decision making. However, Dr. Abrams' also predicts that there is little likelihood
8 that Kelly will make any attempt to cooperate or communicate with counsel in any
9 rational manner. Dr. Abrams' believes that even if Kelly was willing to try to
10 communicate effectively, only a structured exchange of information could take
11 place through a forced choice methodology, similar to the SSSQ testing engaged in
12 by Kelly. Dr. Abrams' believes that Kelly lacks the capacity to rationally
13 communicate with his attorneys in response to general, unstructured questioning,
14 because he is apparently unable to present information related to any subject in a
15 narrative form. (Dr. Abrams' declaration ¶¶ 71-75.) Accordingly, while Kelly is
16 clearly mentally ill and lacks the present ability to communicate in an unstructured
17 narrative fashion, he has failed to demonstrate he lacks the ability to rationally
18 communicate with current counsel in response to structured questions.

19 Kelly's ability to respond to structured questions of current counsel is
20 sufficient current mental competency within the meaning of *Rohan*. As the Ninth
21 Circuit has acknowledged, a criminal defendant's right not to stand trial while
22 mentally incompetent "certainly does not imply a coordinate requirement on
23 collateral review." *Nash*, 2009 U.S.App.LEXIS 20284, at *8. Accordingly,
24 Kelly's right to assist current counsel in his federal habeas proceedings is solely a
25 statutory right that does not implicate his right to counsel under the Sixth
26 Amendment. *Id.*, at *6, fn. 5.

27 The right to competency implied by the statutory right to counsel rests with
28 the conclusion that "rational communication could still play an important role in a

1 habeas proceeding” because a capital petitioner’s incompetence could prevent him
2 from “communicating information that he alone possesses.” *Nash*, 2009
3 U.S.App.LEXIS 20284, at *8. Observing that “meaningful assistance of counsel
4 is essential to the fair administration of the death penalty and rational
5 communication is essential to meaningful assistance of counsel,” the Ninth Circuit
6 concludes that it follows that the Congressional mandate that has provided
7 condemned inmates with counsel in federal habeas proceedings “cannot be
8 faithfully enforced unless courts ensure that a petitioner is competent.” *Id.* at *8-9,
9 quoting *Rohan*, 334 F.3d at 813.

10 In determining the precise level of rational communication that satisfies the
11 level of competency required to ensure the “fair administration of the death
12 penalty” within the meaning of *Rohan*, this Court should be guided by the
13 limitations on a federal court’s exercise of habeas jurisdiction. As the United States
14 Supreme Court has explained, it is necessary to impose “significant limits” on the
15 discretion of federal courts to grant habeas relief because the exercise of habeas
16 jurisdiction by a federal court entails “profound societal costs.” *Calderon v.*
17 *Thompson*, 523 U.S. at 554-555. These limits on the exercise of habeas jurisdiction
18 reflect an “enduring respect” for the interest of states in the finality of convictions
19 that have survived direct review within the state court system. *Id.* at 555; *Brech v.*
20 *Abrahamson*, 507 U.S. at 635. “Finality is essential to both the retributive and the
21 deterrent functions of criminal law.” *Thompson*, 523 U.S. at 555. Finality
22 enhances the quality of judging and serves to preserve the “federal balance.” *Id.*
23 Federal habeas review “frustrates ‘both the States’ sovereign power to punish
24 offenders and their good faith attempts to honor Constitutional rights.’” *Id.* at pp.
25 555-556. The “power of the State to pass laws means little if the State cannot
26 enforce them.” *Id.* at 556.

27 In the context of the death penalty, the United States Supreme Court has
28 recognized the “significant interest” the State retains “in meting out a sentence of

1 death in a timely fashion.” *Nelson v. Campbell*, 541 U.S. 637, 644 [124 S.Ct. 2117,
2 158 L.Ed.2d 924 (2004). Moreover, in light of the fact this Court has granted a stay
3 of execution as to both of Kelly’s death sentences, this Court has a “duty to take all
4 steps necessary to ensure a prompt resolution of the matter, consistent with its duty
5 to give full and fair consideration to all issues presented in the case.” *In re
6 Blodgett*, 502 U.S. 236, 238 [116 L.Ed. 2d 669, 112 S.Ct. 674 (1992) (per curiam)].

7 As the Ninth Circuit has explained, it is not the nature of the proceeding, i.e.,
8 habeas or appeal from the habeas proceeding, that determines the level of
9 competency that is required, but instead “the inquiry should be whether rational
10 communication with the petitioner is essential to counsel’s ability to meaningfully”
11 pursue relief on behalf of the petitioner. *Nash*, 2009 U.S.App.LEXIS 20284, at
12 *15. Inasmuch as habeas counsel has the benefit of extensive records, including
13 Kelly’s statements and information he provided to police and to the myriad of
14 mental health professionals who evaluated him, and all the independent sources of
15 information from the trial and appellate proceedings, it is not necessary to the fair
16 administration of the death penalty, to the full and fair resolution of Kelly’s habeas
17 petitions, or to ensuring Kelly’s current counsel can meaningfully pursue habeas
18 relief on Kelly’s behalf, that Kelly have the present ability to respond to
19 unstructured questions in a narrative fashion. Any information that must be
20 obtained solely from Kelly at this juncture in the criminal justice process such that
21 meaningful representation by counsel would depend upon obtaining that
22 information from Kelly, can be obtained from Kelly through structured questioning.
23 The only impediment to such questioning is that Kelly understands all too well that
24 his ability to avoid execution rests with exaggerating his symptoms and not
25 communicating with counsel. Under these circumstances, Kelly cannot sustain his
26 burden of demonstrating mental incompetence within the meaning of *Rohan*.

27

28

CONCLUSION

This Court should deny Kelly's motion as he has failed to sustain his burden of proof of demonstrating his inability to communicate rationally with his current counsel by a preponderance of the evidence.

Dated: September 25, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: Kelly v. Wong No. 93CV2951-TJH

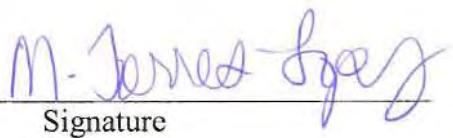
I hereby certify that on September 25, 2009, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

OPPOSITION TO PETITIONER'S MOTION TO STAY FEDERAL HABEAS CORPUS PROCEEDINGS DUE TO INCOMPETENCE OF PETITIONER

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 25, 2009, at San Diego, California.

M. Torres-Lopez
Declarant


Signature

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